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In the

Supreme Court of the United States

S. James Brown, Joint Tenant Trustee,

Petitioner,

v.

MONTGOMERY COUNTY TAX CLAIM BUREAU,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether Federal Contract Clause claims are actionable under 42 U.S.C. § 1983.

2. Whether the Tax Injunction Act precludes federal court jurisdiction over Federal Contract Clause claims.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2006

S. JAMES BROWN, JOINT TENANT TRUSTEE,
Petitioner,

v.

MONTGOMERY COUNTY TAX CLAIM BUREAU,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

S. James Brown, Joint Tenant Trustee (with the right of survivorship) respectfully petitions for a writ of certiorari to review the certified judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported. (App., *infra*, 12a) (*S. James Brown, Joint Tenant Trustee v. Montgomery County Tax Claim Bureau*, No. 04-3455 (3rd.Cir. April 4, 2006)). The opinion of the district court is unreported. (App., *infra*, 10a) (D.C. No. 00-cv-04564)).

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment on April 4, 2006. Petitioner

Brown's Petition for Rehearing En Banc was denied on May 31, 2006. The statutory provision conferring jurisdiction upon this Honorable Court is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Constitution of the United States at Article I, Section 10, commands that: "No state shall... pass any... Law impairing the Obligation of Contracts...Article VI commands, in part, that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby..." The Fifth Amendment commands in part, that, "no person shall be.... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment commands in part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 1983 of Title 42 of the United States Code creates an exclusive federal remedy to vindicate civil rights against persons acting under color of state law.

Federal district courts have original federal question and civil rights jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

The State of Pennsylvania's General County Assessment Law, codified at 72 Pa.C.S. § 5020-201 *et. seq.*

STATEMENT OF THE CASE

Petitioner, S. James Brown ("Brown") is a Joint Tenant Trustee and real party in interest held subject to terms of a declaration of trust embodied in a trust deed recorded in the Recorder of Deeds Office of Montgomery County, Pennsylvania (Kepoint Preservation Trust). Brown filed an Amended Civil Rights Complaint in his own right in district court pursuant to the Federal Contracts Clause and 42 U.S.C. § 1983 ("§ 1983").[1] Brown contends that Pennsylvania failed to provide an adequate remedy at law to adjudicate his federal-law claims in contravention of rights secured to him by the Federal Contract Clause and Fourteenth Amendment. (App. *infra*, 20a and 21a(4)). The original jurisdiction of the district court is authorized by 28 U.S.C. § 1331 (general federal question jurisdiction) and 28 U.S.C. § 1343 (jurisdiction over any civil rights action authorized by law).

Here, the district court dismissed Brown's Amended Complaint for lack of subject matter jurisdiction. (App. *infra*, 10a). On appeal, a panel of the United States Court of Appeals for the Third Circuit ("Third Circuit") stated in its Opinion, that: "Brown...is the real party in interest who claims an injury to his right to contract caused by tax collection efforts...which could be redressed if a court ruled

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[1] The original § 1983 Complaint was filed September 8, 2000 naming Kepoint Preservation Trust ("Kepoint") and Petitioner Brown as Plaintiffs. The district court dismissed the "state defendants" on December 22, 1999 based on the lack of jurisdiction. Brown's Third Circuit appeal of August 26, 2004 was denied July 3, 2002 (Kepoint was dismissed for lack of counsel). On January 21, 2003 Brown's Petition for Writ of Certiorari was denied. The district court retained jurisdiction over Brown's civil rights action until his Amended Complaint was filed on July 26, 2004. (App., *infra* at 6a-7a, 19a-28a).

in his favor." The panel concluded, "Brown has standing" to bring his § 1983 action. (App. *infra*, 13a). However, the Third Circuit affirmed the district court Order dismissing Brown's Amended Complaint. In addition, the Third Circuit awarded $1500.00 against Brown, a *pro se* plaintiff, in damages under **Fed. R. App. P.** 38 for taking an appeal from the district court. (App. *infra*, 12a-14a). A Petition for Rehearing En Banc was filed on April 18, 2006 and denied on May 31, 2006. The instant Petition for a Writ of Certiorari to this Honorable Court followed.

A. Petitioner Brown Is A Joint Tenant Trustee Seeking To Enforce And Vindicate His Federal Rights Under A Contract Affected By Allegedly Unconstitutional State Legislation.

The questions presented here involve construction of the Federal Contract Clause, Supremacy Clause, Fourteenth Amendment, 42 U.S.C. § 1983, and Pennsylvania's General County Assessment Law, codified at 72 Pa.C.S. § 5020-201 *et. seq.* ("GCAL") in light of *Carter v. Greenhow*, 114 U.S. 317 (1885). Since 1885, this Court's ruling in *Carter* appears to be the only previous case discussing a § 1983 claim brought for the violation of the Contracts Clause. This case may represent a golden opportunity for this Court to review this important civil rights issue.

Petitioner Brown is a real party in interest held subject to a declaration of trust in a trust deed. Brown alleges in his § 1983 Complaint, a violation of the federal right conferred by the Contract Clause and the deprivation of liberty and property interests without due process of law in violation of the Fourteenth Amendment, under circumstances where the question turns on the terms of his contract. Federal law controls whether an agreement constitutes a contract for purposes of Contract Clause analysis. *General Motors Corp. v. Tomein*, 503 U.S. 181, 187 (1992). It is long established that "trust deeds are contracts within the

meaning of the Federal Constitution." *Coolidge v. Long*, 282 U.S. 582, 595 (1930). In *Coolidge*, the Court stated the rule that was in effect in 1930, that:

> It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain for itself its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution. *Railroad Commission v. Eastern Texas R. Co.*, 264 U.S. 79, 86, and cases cited.

Coolidge, 282 U.S. 597. The rule set forth in *Coolidge* appears to be applicable to the facts of this case. The trust deed in dispute was recorded in the Montgomery Recorder of Deeds on February 24, 1997. On February 26, 1997, Brown was appointed under terms of the unincorporated trust arrangement to serve in the capacity of a Joint Tenant Trustee with the existing trustees. The address of the realty held subject under the trust deed is 371 West Main Street, Trappe, Pennsylvania.

Purportedly under Pennsylvania's GCAL, a general real estate tax was imposed upon the contract (Kepoint Preservation Trust), naming the trust document as the "owner, "taxpayer" or "person" subject to tax. By virtue of a straw party transaction, the contract does not appear to convey an interest in realty to a person or persons other than the grantor, as strictly defined for statutory purposes by the well-established technical meanings of the words. Accordingly, Brown contends that the declaration of trust embodied in the trust deed evidences "a document which the

Commonwealth is prohibited from taxing under the Constitution or laws of the United States." The distinction between owners and trustees, public and private, runs through the entire fabric of our law.

Brown, through the comprehensive judicial proceeding provided under § 1983, is seeking, in part, a judicial determination declaring the nullity of the attempt to impair the obligation of his contract, a civil right secured to him by the Federal Contract Clause. The Montgomery County Tax Claim Bureau or ("Respondent") has threatened on multiple occasions to sell the subject property at public tax sale "despite the terms of trust" and ongoing § 1983 litigation. Brown believes the property (corpus) may be scheduled to be included in the next public tax sale to be held on or about September 23, 2006.

B. Proceedings Below

In response to the district courts' Order of July 16, 2006, Petitioner Brown filed an Amended § 1983 Complaint. The district court Order requested Brown to "notify the Court if he wishes to proceed with his case against the Tax Claim Bureau..." (App., infra. 8a). Brown was the only plaintiff named in his Amended Complaint. The Respondent is currently the only remaining defendant. Count I of Brown's Amended § 1983 Complaint referred to a violation of the Federal Contract Clause and Count II referred to violations of his civil rights, privileges, or immunities secured by the Fourteenth Amendment. Brown's civil rights include the right secured to him by the Federal Contract Clause (the individual right to judicial process to invalidate the unconstitutional legislation of the state when it is set up against the enforcement of his rights under his contract).

The district court dismissed Brown's Amended § 1983 Complaint for lack of jurisdiction in its Order of August 17, 2004. The Order states that "[T]he reasoning that

formed the basis of the Court's dismissal of the case against the [state defendants] and other defendants applies here." In addition, the Order stated: "Since the Court's dismissal of the case against the other defendants, the plaintiff has brought litigation in the Montgomery County Court of Common Pleas. The trial court dismissed the plaintiff's action [for lack of subject matter jurisdiction] and the Commonwealth Court affirmed the dismissal. Review by this Court is foreclosed by the Rooker-Feldman doctrine." *S. James Brown v. Tax Claim Bureau*, No. 00-cv-04564-MAM, Slip op. (E.D. Pa. 2 Aug. 17, 2004) (App. *infra*, at 10a).[2] This Honorable Court should take judicial notice that the

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[2] Due to the annual reoccurrence of the real estate assessments levied upon the trust deed in dispute, Brown filed a § 1983 action in the Court of Common Pleas of Montgomery County, Pennsylvania on March 14, 2003 and a Petition for Injunctive Relief on April 17, 2003. On May 12, 2003, the Common Pleas court issued its Decree stating that "This Court does not have subject matter jurisdiction to hear the petition for injunctive relief or to entertain the complaint", citing *Aquarian Church of Universal Service v. County of York*, 494 A.2d 891 (Pa. Cmwlth. 1985); *Erie County League of Women Voters v. Commonwealth of Pennsylvania Department of Environmental Resources*, 525 A. 2d 1290 (Pa. Cmwlth. 1987). The Decree also stated that "the plaintiff has not shown such extraordinary facts to allow this Court to take jurisdiction even though administrative remedies have not been exhausted, citing this Court's ruling in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 591, 115 S.Ct. 2351, 2357 n.6 (1995). The Commonwealth Court affirmed the trial court. Pennsylvania's Supreme Court declined to hear Petitioner Brown's appeal pursuant to its discretionary jurisdiction. The Supreme Court of the United States denied Petitioner Brown's Petition for a Writ of Certiorari.

district court continually retained jurisdiction over this action as explained in its Order of January 11, 2004 until Brown's Amended Complaint was filed on July 26, 2004. (App. *infra*, at 6a-7a).

As explained by the Third Circuit in its Order of April 4, 2006, "the district court dismissed the claims against most Defendants on the basis of Eleventh Amendment Immunity, the Tax Injunction Act, and its discretion to decline to hear state law claims under 28 U.S.C. § 1367(c)." The prior district court Order can be found at App. *infra*, 1a-4a. In its Order of April 4, 2006, the Third Circuit affirmed the district court's dismissal of Brown's Amended Complaint. The Circuit court Opinion stated that "[A]lthough Brown has standing"...the Tax Injunction Act bars the injunctive and declaratory relief sought...and the free-standing principle of comity bars damages...The *Rooker-Feldman* doctrine bars review of his claims because Pennsylvania court rulings (that the Pennsylvania Board of Assessment Appeals is the exclusive forum for Brown's claims)...are inextricably intertwined with Brown's federal suit." In addition, the Third Circuit granted the Respondent Tax Claim Bureau's motion for just damages and double costs pursuant to Federal Rule of Appellate Procedure 38 in the amount of $1500.00 against Brown.

What the district court and the Third Circuit Orders did not say with respect to Brown's federal-law questions presented here is: (1) why Brown's Contract Clause Claim is not actionable under § 1983 given the long established legal principle that the Contract Clause secures to Brown, the federal right to a judicial determination declaring the nullity of the attempt to impair the obligation of his contract. (2) an explanation of the legal basis for the implied proposition that the Tax Injunction Act abrogated Brown's federal right to judicial process to invalidate the allegedly unconstitutional legislation of the State of Pennsylvania secured to him by the

Contract Clause, Fourteenth Amendment, and § 1983 (3) what analysis was utilized to conclude that the GCAL's remedial scheme provides a "judicial determination" as required to be adequate for purposes of the Contract Clause under the standard set down by this Court in *Rosewell v. LaSalle National Bank*, 450 U.S.503 (1981) which would preclude district court jurisdiction, under 28 U.S.C. § 1341.

This case presents two important federal law questions. First, whether Federal Contract Clause claims may be brought under 42 U.S.C. § 1983. Second, whether the Tax Injunction Act precludes federal court jurisdiction over Federal Contract Clause claims.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Has Rendered A Decision In Conflict Directly Or In Principle With The Decision Of The Ninth Circuit And Aggravates The Existing Split Of Authority Of Other Lower Courts On The Question of Whether Federal Contract Clause Claims Are Actionable Pursuant To 42 U.S.C. § 1983.

In the beginning, the federalists and the anti-federalists agreed in principle that any State may pass laws impairing the obligations of private trust contracts and therefore providing a federal remedy against such laws would be unnecessary. What a different form of government we would have if the above statement were true.

Under our Constitutional Republic, every lower court should be unified with respect to the jurisdictional question of whether Federal Contracts Clause claims are actionable under 42 U.S.C. § 1983 in the first instance. Federal causes of action are defined by federal law so that the outcome would be the same in a state or federal forum. *Howlett v.*

Rose, 496 U.S. 356, 367-373 (1990). The questions presented here have not been, but should be, settled by this Court due to its importance of the constitutional and procedural rights of the public at large and the parties to the trust deed in dispute. Currently, certain federal constitutional, statutory, and procedural rights appear to be unenforceable in areas of the United States.

There is a direct conflict of authority in the circuit courts and other lower courts on the question of whether Federal Contract Clause claims are actionable under § 1983. For instance, in *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003), the Ninth Circuit Court of Appeals stated that:

> [T]he right of a party not to have a State, or political subdivision, impair its obligations of contract is a right secured by the first article of the United States Constitution. A deprivation of that right may give rise to a cause of action under section 1983...The Supreme Court's decision in *Carter v. Greenhow*, 114 U.S. 317... (1885) is not to the contrary."

Southern Cal. Gas, 336 F.3d 887.

In contrast, the Fourth Circuit Court of Appeals affirmed the district court's decision in *Andrews v. Arundel County*, 931 F. Supp. 1255, 1267 (D. Md. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997), *cert. denied*, 522 U.S. 1015 (1997) where the district court held that "despite the cogency of plaintiff's arguments to the contrary, a contract clause claim may not be asserted under § 1983." The district court cited *Carter v. Greenhow*, 114 U.S. 317 (1885) to draw the opposite conclusion than that of the Ninth Circuit's ruling in *Southern Cal. Gas* (2003).

The Second Circuit Court of Appeals concluded in *Haley v. Pataki*, 106 F.3d 478, 482 n.2, (2nd Cir. 1997), that it is unclear whether a contract clause claim may be brought

under § 1983, however, the panel chose not to resolve the issue because it was not argued in either the district or circuit court. Other lower courts conflict on this issue as well. [3]

The district court opinion of December 22, 2000 acknowledges Brown's allegations of violations of the Federal Contract Clause and the Fourteenth Amendment raised in his § 1983 Complaint. (App. *infra*, at 1a). Here, by failing to address this issue, the district court and the panel for the Third Circuit, impliedly concluded that Contract Claims may not be actionable under § 1983 and that Brown did not have a right to a judicial determination declaring the nullity of the attempt to impair the obligation of his contract. The Third Circuit's Opinion did not even mention the civil rights statute of § 1983 at all. (App. *infra*, at 12a-14a).

Interestingly, a number of other circuit courts, while not addressing whether a Contract Clause claim is actionable pursuant to § 1983, impliedly accepted the position that it is

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[3] *Compare the federal rights of persons commencing a contract clause action under § 1983 in Mississippi or New York, District Courts*: *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 261 F.Supp.2d 626 (N.D. Miss. 2003)(Contracts Clause is enforceable under § 1983); *TM Park Ave. Assocs. V. Pataki*, 44 F. Supp.2d 158 (N.D.N.Y. 1999), *vacated*, 214 F. 3d 344 (2nd Cir. 2000)(federal district court held that the contract clause is enforceable under § 1983) *with other persons commencing a similar claim in Maryland or, Colorado*: *Andrews v. Arundel County*, 931 F. Supp. 1255, 1267 (D. Md. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997), *cert. denied*, 522 U.S. 1015 (1997); *State Court*: *Kilbourn v. Fire and Police Pension Ass'n*, 971 P.2d 284, 288 (Colo. Ct. App. 1998)(violation of contract clause does not give rise to § 1983 claim), citing *Carter v. Greenhow*, 114 U.S. 317 (1885).

by allowing Contract Clause claims to proceed under § 1983. *See*, *Smith v. City of Enid*, 149 F.3d 1151, 1154 (10th Cir. 1998) *Heart of American Grain Inspection Serv., Inc. v. Missouri Dept. of Agriculture*, 123 F. 3d 1098, 1106 (8th Cir. 1997). *Edwards v. City of Manchester*, 121 F.3d 695 (1st Cir. 1997) (applying § 1983 statute of limitations to Contract Clause action). *But see S. James Brown, Joint Tenant Trustee v. Montgomery County Tax Claim Bureau*, No. 04-3455, Slip.op. (3rd Cir. April 4, 2006)(implied rejection of Federal Contract Clause Claim) (App., *infra.*, 12a-14a).

Here, a natural person disposed of certain unencumbered realty under terms embodied in a trust deed. Black's Law Dictionary, 6th Ed. at 919 defines natural liberty to include "the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consistent with their happiness on condition of their acting within the limits of the law of nature, and so as not to interfere with an equal exercise of the same rights by other men." 1 Bl.Comm. 125. The right to contract about one's affairs is part of the liberty of the individual protected by the Fifth and Fourteenth Amendments, and this is settled law under the decisions of this Honorable Court and is no longer open to question. *See e.g., Adkins v. Children's Hospital*, 261 U.S. 525, 545 (1923); *Board of Regents v. Roth*, 408 U.S. 564, 572, (1972). The right held by natural persons to dispose and hold private property under terms embodied in a trust deed (contract) is a civil right that is not derived from the State.

Article I, section 10 is replete with substantive limitations upon the jurisdiction of state legislatures, one of which is that no state may pass any law impairing the obligations of contracts. A construction of the term "obligation" to include rights as duties is also indicated. The contract clause requires that the legislature be precluded from releasing a promisor from his obligations because of

the need to guard against the evils of legislative appropriation of privately held property outside the boundaries of constitutional limitations. If the contract clause does not limit the state's power to regulate the right to make future contracts, then it is perfectly acceptable for the state to pass a law barring any individual from entering into any contract whatsoever, be it for the transfer of property or the rendering of services. *See generally*, Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703 (1984). Thus the power of a legislature to alter rights vested pursuant to "private trust" arrangements must be constrained by enforceable constitutional limitations.

It has long been established that trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. *Coolidge v. Long*, 282 U.S. 582, 595 (1930). Constitutional limitations may preclude a state from appropriating private property held pursuant to a trust deed from the common pool. Under our Constitution, if rights granted by a trust deed are so vested that interference with them impairs the obligation of the contract embodied in the deed, it necessarily follows that such interference deprives the grantee of his property without due process of law in violation of the Fourteenth Amendment. The converse is equally true. Unless a tax can be sustained as an excise, it must fail altogether. Here, if Pennsylvania's GCAL were construed as imposing a property tax upon a private trust deed (document) to which it is prohibited under the Constitution and laws of the United States, the GCAL would be null, and void under U.S.Const.art. VI, the Supremacy Clause.

The Second Circuit recognized in *Association of Surrogates and Supreme Court Reporters within the City of New York v. State of New York*, 940 F. 2d 766, 771, (2nd Cir. 1991), *cert. denied*, 502 U.S. 1058, 112 S.Ct. 936, 117 .Ed.2d 107 (1992), "[The Contract] [C]lause is 'one of the

few "rights protecting" provisions in the original Constitution', and has been called by one legal historian 'the bulwark of American individualism against democratic impatience and socialistic fantasy.'" (quoting G. Stone, L. Seidman, C. Sunstein, & M. Tushnet, CONSTITUTIONAL LAW 1428 (1986) and H. Main, POPULAR GOVERNMENT 247-48 (1885). This principle was recognized and applauded by Martin A. Schwartz, Professor of Law at the Touro Law Center. Professor Schwartz did an analysis of "constitutional rights protected by § 1983" and concluded that "the better view is that the contract clause is enforceable under § 1983." *See generally*, M Schwartz, SECTION 1983 LITIGATION, Claims and Defenses at § 3.03[B][4], Contract Clause (4th Ed. 2006-1 Supp.).

Section 1983 broadly authorizes redress for the violation of "any rights, privileges, or immunities secured by the Constitution. 42 U.S.C. § 1983. Clearly, the prime purpose of § 1983 was to provide a remedy for violations of the Fourteenth Amendment rights. In *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), the Court ruled that § 1983 does not distinguish between personal rights and property rights stating that a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other, especially in "mixed" cases involving both types of rights, as here. *Id.* at 550-552.

This conclusion suggests that the modern thrust of contract's clause jurisprudence is precisely backwards. It is interference with private contracts that lies at the heart of the clause because of the perception that state governments are especially susceptible to control by self-aggrandizing political factions. This perspective suggests particular vigilance against laws altering private contractual arrangements [of the nature in dispute here]. *See, Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

See also, generally, Michael w. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 294 (1988). *See also*, B. Wright, *The Growth of American Constitutional Law*, 41 (1967)(The primary intent behind drafting the clause was to prohibit states from adopting laws that would interfere with the contractual relationships between private citizens) and generally B. Wright, *The Contract Clause*, 57 Harv. L. Rev. 512, 621, 852 (1944)(three part article)(Express constitutional provisions upon the states should serve to prevent any statute that would alleviate the commitments of one party to a contract or make enforcement of the contact unreasonably difficult).

Petitioner Brown contends that the Federal Contract Clause confers "rights, privileges, and immunities" within the meaning of § 1983. Therefore, alleged violations of the Federal Contracts Clause, as distinguished from a breach of contract case, should be actionable under § 1983. This would not conflict with the Court's ruling in *Carter v. Greenhow*, 114 U.S. 317 (1885), ("Carter"), the only previous case discussing a 1983 claim brought for the violation of the Contracts Clause. In *Carter* the Court stated:

> In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation...Congress has provided no other remedy for the enforcement of this right.

Carter, 114 U.S. 322. In *Carter*, the very narrow question before the Court was, whether the federal courts had jurisdiction and thus, whether "the facts stated in plaintiff's declaration constitute a cause of action within the terms of [section 1983]." The *Carter* ruling was limited in scope to the specific facts set forth in the plaintiff's declaration. The

Carter Court affirmed the dismissal of his action upon the limited ground that Carter failed to state a claim under § 1983 because it only stated a breach of contract claim. *Carter*, 114 U.S. at 323; *Dennis v. Higgins*, 498 U.S. 439, 451 n.9 (1991); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, at n.29 (1979) (*Carter* "held as a matter of pleading that the particular cause of action set up in the plaintiffs pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the contract clause], to which he had 'chosen not to resort.'"; *McGahey v. State of Virginia*, 135 U.S. 662, 10 S.Ct. 972, 978, 34 L.Ed. 304 (1890).

Upon review, it becomes apparent that the *Carter* Court did not hold that § 1983 was not a proper avenue to redress a violation of the Contract Clause, but only that the facts in Carter's complaint failed to show a cause of action within the terms of § 1983. Thus, it appears that the *Carter* Court implicitly recognized that a claim for a violation of the Contract Clause could be brought pursuant to § 1983 assuming a properly pleaded Complaint.

More recent Supreme Court cases support Brown's contention that a claim alleging a violation of the Contract Clause may be pursued under § 1983. *See* e.g. *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991), ("*Dennis*"). *Dennis* presented a similar question of whether a claim under the dormant commerce clause, U.S. Const.Art. I, § 8 is actionable pursuant to § 1983. The majority opinion in *Dennis* ruled that "Commerce Clause" claims may be brought under § 1983's broad coverage because the clause confers "rights, privileges, or immunities" within the meaning of 1983 due to its substantive restriction on the power of the States. *Dennis*, 498 U.S. at 443-451 (relying on *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989); *Monell v. New York City Dept. of*

Social Services, 436 U.S. 658, 684 (1978); *Hughes v. Oklahoma*, 441 U.S. 82, 87 (1979).

This Court's analysis in *Dennis* (concluding that a Article I, Commerce Clause claim can be brought under § 1983) is equally applicable to an Article I, Contract Clause claim brought under § 1983. Like the Commerce Clause, the Contract Clause confers a right, privilege, or immunity because it is a substantive restriction on permissible state legislation that would impair the obligations of contracts. Because the Commerce Clause and the Contract Clause both create self-executing limitations on the power of the states, a person injured by state action that violates the Contract Clause should be similarly entitled to bring a claim directly under § 1983. The implication of the *Dennis* majority's discussion of *Carter* is that it would find contract clause claims enforceable under § 1983. That is due to the fact that the Contract Clause, like the Commerce Clause meets the three considerations set forth in *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, (1969) for determining whether a federal statute confers a "right" within the meaning of § 1983.

The three *Golden State* factors are set forth in the footnote below [4]. When applying the *Golden State* factors to the instant case, they weigh heavily in favor of finding a

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[4] "In deciding whether a federal right has been violated, we have considered (1) whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment... (2) The interest the plaintiff asserts must not be 'to vague and amorphous' to be 'beyond the competence of the judiciary to enforce'... (3) whether the provision in question was 'intend[ed] to benefit' the putative plaintiff..." *Dennis v. Higgins*, 498 U.S. at 448-450 (and cases cited).

cause of action under § 1983 for violations of the Contract Clause. First, the Contract Clause does not express a mere preference for certain kinds of treatment, but clearly creates a binding obligation on government. That obligation is that states not pass or enforce laws impairing the obligations of contracts unless such laws serve a significant public purpose and the means chosen to accomplish this purpose are reasonable and appropriate and do not diminish individual rights secured by the Fourteenth Amendment.

Second, Petitioner Brown's asserted interest is not too vague and amorphous to be beyond the competence of the judiciary to enforce. Courts certainly can grasp the obligations created by contracts and can enforce those interests by declaring the offensive legislation unconstitutional. In fact, the Third Circuit has acknowledged in its opinion that Brown "has standing" as "the real party in interest who claims an injury to his right to contract caused by tax collection efforts...which could be redressed if a court ruled in his favor."

Finally, the Contract Clause was intended to benefit the plaintiff herein, a real party in interest under a trust deed alleging that State of Pennsylvania has failed to provide him an adequate remedy at law under the Federal Contract Clause. Like the Commerce Clause, the Contract Clause "of its own force imposes limitations and certain responsibilities upon state legislation and is the source of a right of action in those injured by regulations that exceed such limitations." *Dennis*, 498 U.S. 447; *Carter*, 114 U.S. 322 ("[T]he *individual* has a right to have a judicial determination declaring the nullity of the attempt to impair [the] obligation.")(*emphasis added*)); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the

law, and the parties are entitled to rely on them"). The Constitution's Supremacy Clause secures federal rights by according them priority whenever they come into conflict with state law.

The decision in *Dennis* is especially significant due to its specific holding and its liberal interpretation of § 1983 by resolving the conflict between § 1983's unqualified language referring to rights secured by any provision of the federal Constitution and § 1983's more limited historical purpose of enforcing the Fourteenth Amendment. Accordingly, the implication of the *Dennis* majority's discussion of Carter and its opinion stated in *Monell* is that it would find Petitioner Brown's contracts claims enforceable under § 1983.

In sum, the Supreme Court's conclusion with respect to the Commerce Clause strongly supports Brown's contention that the Contract Clause also is actionable under § 1983. As the dissent in *Dennis* noted, unlike the commerce Clause, the language that "[n]o state shall…pass any…Law impairing the Obligation of Contracts… would provide some support for an argument that the Contracts Clause prohibits States from 'doing what is inconsistent with civil liberty.'" *Dennis*, 498 U.S. 456 (quoting U.S. Const. Art. I, § 10; Cong. Globe 333 (Rep. Hoar) (Kennedy and Rehnquist, J.J., dissenting)). Thus according to the reasoning of the dissent, the contract Clause provides an even more compelling basis for a § 1983 claim than the Commerce Clause (even though the dissenting opinion was not suggesting that a violation of the Contract Clause is actionable through § 1983). By logical extension, then, if the Commerce Clause is actionable under § 1983, then so must the Contract Clause. The Founding generation held property and contractual rights dear, and for good reasons. That is the reason they provided for aggressive judicial review for alleged violations of Article I and the Bill of Rights.

The conflict in the lower courts create enormous uncertainty concerning the possibility of attaining attorney fees under 42 U.S.C. § 1988, the purpose of which, is to compensate a prevailing § 1983 plaintiff for expenses in vindication of civil rights. In truth, rights secured by the Federal Contract Clause, Fourteenth Amendment and § 1983 are equal rights for all persons within the jurisdiction of the United States. Every person and public entity within the jurisdiction of the United States has an interest in the resolution of this exclusively federal-law question.

In the beginning, the states were prohibited under Article I of our Constitution from passing any law impairing the obligations of contracts. They still are.

II. Absent Clarity By This Honorable Court, Redundant § 1983 Litigation Will Continue Unabated And Brown's Federal Rights May Be Lost Forever.

Brown has alleged in his Amended Complaint that Pennsylvania's GCAL fails to provide him an adequate remedy at law, and if true, the district court would have subject matter jurisdiction. (App., *infra* at 20a and 21a (4)). Brown believes that Pennsylvania's GCAL is set up against enforcement of his rights under his contract, and therefore is unconstitutional. Brown contends that he has a constitutional right to a judicial determination under declaring the nullity of the attempt to impair the obligation of his contract in the first instance, which may not lawfully be eliminated by an act of Congress or Pennsylvania's legislature. U.S.Const.art.I, § 10. In this case, there is the existence of a substantial question of constitutionality and the alleged absence of an adequate state statutory remedy.

In *Carter v. Greenhow*, 114 U.S. 317 (1885) ("*Carter*"), the Court held that the Federal Contract Clause secured to individuals, the right to "judicial process to

invalidate the unconstitutional legislation of the State when it is set up against the enforcement of his rights under his contract..." *Carter*, 114 U.S. at 322. Therefore, the question of whether the Tax Injunction Act, currently codified at 28 U.S.C. § 1341 or ("TIA") precludes federal court jurisdiction over Federal Contract Clause claims raises an important jurisdictional issue. In Contract Clause cases, federal rights may be lost forever if the applicable state statute does not provide "judicial process" conferred by the Contract Clause to real parties in interest to a trust deed or other contract within the meaning of the Federal Constitution. It appears that there has been no prior case directly on point.

Section 1341 of Title 28 the United States Code states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain speedy, efficient remedy may be had in the courts of such a State.

28 U.S.C. § 1341. The TIA applies only if "a plain, speedy and efficient remedy" may be had in the state courts and this Courts' ruling in *Fair Assessment In Real Estate Association, Inc., v. McNary*, 454 U.S. 100 (1981) bars resort to the federal courts if state remedies are "plain, adequate, and complete." Both phrases refer to the obvious precept that plaintiffs seeking to protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost. *Id.* at 116 n.8. The leading case defining "a plain, speedy and efficient remedy" appears to be *Rosewell v. LaSalle National Bank*, 450 U.S.503 (1981).

A state remedy is procedurally adequate under the holding in *Rosewell* as long as it provides a federal plaintiff with "a full hearing and *judicial determination*" at which she may raise any and all constitutional objections to the tax.

Rosewell, 450 U.S. at 514 (*emphasis added).* In contrast, the constitutional right exception to the TIA is intact if state law does not provide a § 1983 plaintiff with "a full hearing and *judicial determination*" at which she may raise any and all constitutional objections to the tax. If the state remedy is inadequate for purposes of the TIA, original district court jurisdiction is understood.

Under Pennsylvania's GCAL, the remedy legislatively ordained as mandatory and exclusive is for a "Taxpayer" to first take an appeal to the Montgomery County Board of Appeals ("Appeals Board"). 72 Pa. C.S. §§ 5020-201 to 5020-602. Pursuant to limited subject matter jurisdiction granted under 72 Pa. C.S. § 5341.14(b): In any appeal of an assessment the board shall make the following determinations: (1) The current market value for the tax year in question; and (2) The common level ratio. The Appeals Board does not hold subject matter jurisdiction to make a judicial determination to invalidate the unconstitutional legislation of the State if it is set up against the enforcement of Brown's rights under his contract pursuant to requisites of Due Process conferred by the Federal Contract Clause. In addition, the Appeals Board does not hold subject matter jurisdiction over federal § 1983 causes of action, which provides injunctive and declaratory relief as well as monetary damages for the "complete" vindication of federal rights.

In his concurring opinion to the majority ruling in *Borough of Greentree v. Board of Property Assessments*, 459 Pa. 268 (1974), Pennsylvania Supreme Court Justice Roberts explained:

> Tax Appeal Boards were created to review real estate tax assessments. They are totally unsuited both by skill and purpose to adjudicate constitutional issues. The board procedures may perhaps be adequate for deciding individual claims of improper assessment (cases cited), but they are plainly inadequate when

> faced with a broad-based attack on the constitutionality of a taxing statute, as here, or the assessment procedure. Necessarily, the multiple proceedings before the board involving separate and numerous challenges will always involve "inconvenience, delay and expense" which far exceeds the "utility" of board procedures. It should be noted that superimposed upon these disadvantages is the added burden of multiplicitous litigation and long periods of uncertainty for taxpayers and local government."

Clearly, the administrative remedy provided by Pennsylvania's GCAL fails to provide Brown, or any person similarly situated, with the judicial process conferred by the Contract Clause as stipulated by this Court in *Carter v. Greenhow*, 114 U.S. 317 (1885), and accordingly, does not meet the minimum procedural criteria set forth in *Rosewell v. LaSalle National Bank*, 450 U.S.503 (1981). Pursuant to Brown's equal federal right to "make and enforce contracts" against impairment under color of State law secured by the Federal Contract Clause and Fourteenth Amendment, district court jurisdiction is not precluded by the TIA for purposes of the instant case.

Accordingly, the decision of the Third Circuit is erroneous for numerous reasons. Brown's claims qualify for the constitutional exception to the TIA where, as here, Pennsylvania fails to provide him an adequate remedy for his Contract Clause claims. The Rooker-Feldman doctrine is inapplicable to the instant case because (1) the district court retained jurisdiction over Brown's action and the Respondent during the entire time period that the state action was under review (App. *infra*, at 6a-7a) and (2) The state trial court dismissed Brown's § 1983 for "lack of subject matter jurisdiction", a ruling that was not overturned upon review by any higher court.

Furthermore, Petitioner Brown is proceeding *pro se and is not an attorney.* The Third Circuit awarded damages against him under **Fed. R. App. P**. 38. The district court did not find that his action was frivolous, unreasonable, without foundation, or brought in bad faith. The decision to award damages against Brown pursuant to **Fed. R. App. P**. 38 appears to directly conflict with this Courts' ruling in *Hughes v. Rowe*, 449 U.S. 5 (1980), where the Court held that "an unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claim." The Third Circuit acknowledged this principle in *Beam v. Baur*, 338 F. 3d 106, 109, yet, in the instant case, awarded damages against Brown anyway. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) the Court stated that "although a different standard might be applied in a civil rights action under 42 U.S.C. § 1983, we can perceive no reason for applying a less stringent standard." Accordingly, Petitioner Brown prays that this Honorable Court will grant his Petition for a Writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

S. James Brown, Joint Tenant Trustee

S. James Brown, Joint Tenant Trustee
371 West Main
Trappe, Pennsylvania 19426
(610) 489-3913

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEYPOINT PRESERVATION
TRUST ORGANIZATION

v.

D. MICHAEL FISHER, et al

CIVIL ACTION
NO. 00-4564

ORDER

AND NOW, this 22nd day of December, 2000, upon consideration of the Motion to Dismiss (Docket #16) by defendants D. Michael Fisher, the Commonwealth of Pennsylvania, the Department of Revenue of the Commonwealth of Pennsylvania, the Board of Finance and Revenue of the Commonwealth of Pennsylvania, and the Board of Appeals of the Department of Revenue of the Commonwealth of Pennsylvania ("the state defendants"), and the plaintiffs Response thereto, IT IS HEREBY ORDERED that the Motion is GRANTED.

The reasons for this decision are as follows.

The plaintiffs Complaint seeks monetary, declaratory, and injunctive relief for alleged violations of the federal Constitution (specifically, the right to contract under Art. I, § 10 and the right to equal protection under the Fourteenth

Amendment), and of a Pennsylvania state statute.[5] The state defendants' Motion to Dismiss argues that the state and its agencies are protected by the Eleventh Amendment, and that relief against any of the state defendants is barred by the Tax Injunction Act and associated Supreme Court decisions.

States and state agencies are shielded from federal suits by the Eleventh Amendment. See Seminole Tribe of Florida v. Florida. 517 U.S. 44, *54* (1996); Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy. Inc. 506 U.S. 139, 144 (1993); Hans v. State of Louisiana. 134 U.S. I, 15 (1890): Cory v. White. 457 U.S. 85, 91 (1982). Sec also Will v. Michigan Department of State Police. 491 U.S. 58, 71 (1989). Although a state may waive its Eleventh Amendment immunity and consent to be sued in federal court, Pennsylvania has explicitly withheld such consent. See 42 Pa. C.S. § 852 l (b); Laskaris v. Thomburgh. 661 F.2d 23, 25 (3d Cir. 1981). Congress also has the authority to abrogate Eleventh Amendment immunity, but doing so requires unmistakably clear language. Sec Dellmulh v. Muth. 491 U.S. 223, 230 (1989). None of the statutes cited by the plaintiff meets this test, and the Supreme Court has expressly held that 42 U.S.C. § 1983 docs not abrogate the Eleventh Amendment. Sec Quern v. Jordan. 440 U.S. 332, 341 (1979).

In response, the plaintiff concedes that the Commonwealth of Pennsylvania is not an appropriate defendant, but argues that the Eleventh Amendment docs not protect state officials who violate a federal right under (he

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[5] The plaintiffs Complaint and brief cite 72 Pa. C.S. § 1101 et seq. and in particular, 72 Pa. C.S. § 1102-C 3. However, it appears that the plaintiff meant to cite § I I02-C.3 of the Realty Estate Transfer Tax Act. which was eventually consolidated at 72 Pa. C.S. §8102-C.3.

color of state law.[6] See PI. Resp. at 4. Even if the suit were to proceed against the individual defendant Fisher, however, this Court would be barred from awarding any of the remedies sought by the plaintiff against Fisher or against any of the state defendants.

The Tax Injunction Act (28 U.S.C. § 1341) explicitly bars federal courts from granting injunctive relief in cases involving stale tax schemes where a "plain, speedy, and efficient" remedy is available under state law. See Rosewell v. LaSalle National Bank. 450 U.S. 503 (1981). The plaintiff argues that the Tax Injunction Act does not bar § 1983 claims, and rites Fulton Market Cold Storage Co. v. Cullerton. 682 F.2d 1071 (7lh Cir. 1978) and North American Cold Storage Co. v. Cook County. 468 F. Supp. 424 (N.D. 111. 1979), in support thereof. Both of these lower court cases permitted § 1983 actions for damages despite the prohibitions of § 1341, but they were later overruled by the Supreme Court in Fair Assessment in Real Estate Ass'n. Inc. v. McNary. 454 U.S. 100, 107 (1981) on the principle of federal-state comity.

The plaintiff also argues that there is no "plain, speedy, efficient, or even 'adequate' remedy" 'under state law due to Pennsylvania's "self imposed constitutional limitation upon entering the Union of the United States." See PI. Resp. at 11. If that were so, then no state in this union would be deemed to have an acceptable remedy under the Tax Injunction ACL Surely Congress did not intend to create a law with no meaning.

As the state defendants argue, a "plain, speedy, and efficient" remedy is one that "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." See

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[6] The plaintiff also argues that the Tucker Act (28 U.S.C. § 1346(a)(2)) is a waiver of Eleventh Amendment immunity in certain situations. The Tucker Act does authorize suits against the federal government, but it does not apply to suits against the states. See 28 U.S.C. § 1346(a)(2)

Rosewel], 450 U.S. at 514. Pennsylvania law provides taxpayers with the opportunity lo petition the Board of Finance and Revenue for a refund, 42 Pa. C.S. § 1104. and creates jurisdiction in the Commonwealth Court for appeals there from. See 42 Pa. C.S. § 763. Further appeals to the Pennsylvania Supreme Court are authorized. 42 Pa. C.S. § 723, and review is ultimately available in the United States Supreme Court, 28 U.S.C § 1257. I find that this scheme constitutes a "full hearing and judicial determination" under Rosewell. 450 U.S. at 514, and that the Tax Injunction Act bars the injunctive relief sought by the plaintiff in this case.

Under California v. Grace Brethren Church, 457 U.S. 393, 408 (1982) and McNary, 454 U.S. at 107, the plaintiff's claims for declaratory and monetary relief are also barred. I therefore dismiss the federal claims against the state defendants.

Pursuant to the Supreme Court's direction in Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988), and United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966), I decline to assert jurisdiction over the remaining state law claim.

BY THE COURT

MARY A. McLAUGHLIN

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEYPOINT PRESERVATION
TRUST ORGANIZATION

v.

D. MICHAEL FISHER, et al

CIVIL ACTION
NO. 00-4564

AND NOW, this 18ch day of September, 2001, upon consideration of Plaintiff's Motion for Summary Judgment (Docket #30), defendant Edward Gillespie's Cross Motion for Summary Judgment (Docket #33), and all responses thereto, IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED and Defendant's Motion is GRANTED for the following reasons.

On December 22, 2000, the Court issued an order (Docket #21) dismissing the state defendants from this case because they were protected by the Eleventh Amendment and/or the provisions of the Tax Injunction Act. The remaining § 1983 claim against Mr. Gillespie, as Tax Collector for the Borough of Trappe, is likewise barred by application of these provisions. Therefore, the Court rules in favor of Mr. Gillespe and against Plaintiff for the reasons given in the December 22, 2000 order.

MARY A. McLAUGHLIN
BY THE COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEYPOINT PRESERVATION
TRUST ORGANIZATION

v.

D. MICHAEL FISHER, et al

CIVIL ACTION
NO. 00-4564
FILED JAN 11, 2004

ORDER

AND NOW, this 11th day of January, 2002, the court having be previously advised that the above action cannot proceed to trial and disposition because of the following reason:

[ ] Order staying these proceedings pending disposition of a related action.

[ ] Order staying these proceedings pending determination of arbitration proceedings.

[ ] Interlocutory appeal filed

[x] Other: Order staying these proceedings pending appeal.

It is

ORDERED that the Clerk of court mark this action closed for statistical purposes and place the matter in the Civil Suspense File, and it is

FURTHER ORDERED that the Court shall retain jurisdiction; and that the case be restored to the trial docket when the action is in a status so that it may proceed to final

disposition; this order shall not prejudice the rights of the parties to this litigation.

BY THE COURT:

s/_____
Mary A. McLaughlin

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEYPOINT PRESERVATION
TRUST ORGANIZATION

v.

D. MICHAEL FISHER, et al

CIVIL ACTION
NO. 00-4564
FILED JUL 16, 2004

AND NOW, this 16th day of July, 2004, upon consideration of S. James Brown's Response to this Honorable Court's Order Entered on June 25, 2004, IT IS HEREBY ORDERED that the plaintiff shall notify the Court if he wishes to proceed with his case against the Tax Claim Bureau Court House and the County of Montgomery Recorder of Deeds on or before July 30, 3004. The Court's June 25, 2004 Order referred to the fact that only those two defendants remain in this case, as they had not previously moved for dismissal or summary judgment with the other defendants. There are no claims remaining against any other defendants.

BY THE COURT

MARY A. McLAUGHLIN

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEYPOINT PRESERVATION
TRUST ORGANIZATION

v.

D. MICHAEL FISHER, et al

CIVIL ACTION
NO. 00-4564

Filed Aug 4, 2004

AND NOW, this 4th day of August, 2004, IT IS HEREBY ORDERED that the Clerk of Court transfer said case from the civil suspense file to the active docket.

BY THE COURT:

MARY A. McLAUGHLIN

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEYPOINT PRESERVATION
TRUST ORGANIZATION

v. CIVIL ACTION
CASE NO. 00-4564

D. MICHAEL FISHER, et al

Filed Aug 4, 2004

AND NOW, this 17th day of August, 2004, upon consideration of defendant's motion to dismiss plaintiff's amended complaint (Docket No.53), and plaintiff's opposition thereto, it is hereby ORDERED that said motion is GRANTED and the plaintiff's amended complaint is dismissed with prejudice. The defendant raises several meritorious arguments. The reasoning that formed the basis of the Court's dismissal of the case against the other defendants applies here. In addition, since the Court's dismissal of the case against the other defendants, the plaintiff has brought litigation in the Montgomery County Court of Common Pleas. The trial court dismissed the plaintiff's action and the Commonwealth Court of Pennsylvania affirmed the dismissal. Review by this Court is foreclosed by the Rooker-Feldman doctrine.

BY THE COURT:

MARY A. McLAUGHLIN

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 04-3455

**KEPOINT PRESERVATION TRUST ORG., BY AND THROUGH J. BROWN, JOINT TENANT TRUSTEE

v.

D. MICHAEL FISHER, INDIVIDUAL; COMMONWEALTH OF PA; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BUREAU OF INDIVIDUAL TAXES; COMMONWEALTH OF PA BOARD OF FINANCE AND REVENUE; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BOARD OF APPEALS; THE TAX CLAIM BUREAU COURT HOUSE; EDWARD W. GILLESPIE, TRAPPE BORO TAX COLLECTOR; COUNTY OF MONTGOMERY RECORDER OF DEEDS

*S. James Brown,
Appellant

*(Pursuant to Rule 12(a), F.R.A.P.)

* *(Dismissed Per Clerk's Order of 9/16/04)

On Appeal From the United States District Court For the Eastern District of Pennsylvania
(D.C. Civ. No. 00-04564)
District Judge: Honorable Mary A. McLaughlin

Submitted Under Third Circuit LAR 34.1 (a)

February 28, 2005

BEFORE: ROTH, McKEE and ALDISERT, CIRCUIT JUDGES

(Filed: April 4, 2006)

OPINION

PER CURIAM

S. James Brown, as the "Joint Tenant Trustee" acting on behalf of Kepoint Preservation Trust, an "independent, unincorporated, private inter vivos trust organization," filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania, claiming that the imposition of state taxes after real estate was transferred from an individual to the trust violated the Contracts Clause, U.S. Const. Art. I, § 10, cl.l, and Pennsylvania law. The District Court dismissed the claims against most Defendants on the basis of Eleventh Amendment immunity, the Tax Injunction Act, and its discretion to decline to hear state law claims under 28 U.S.C. § 1367(c). We affirmed that order to the extent that S. James Brown ("Brown") was a party to the action below and was an appellant in his own right, although we dismissed Kepoint Preservation Trust as an appellant because Brown had not obtained counsel for it. *See Kepoint Preservation Trust v. Fisher,* No. 01-3708 (3d Cir. July 3, 2002).

The Montgomery County Recorder of Deeds and the Montgomery County Tax Claim Bureau ("Tax Claim Bureau"), neither of whom had responded to the suit by the time that the first appeal was filed, remained in the case. Brown voluntarily dismissed the claims against the Montgomery County Recorder of Deeds. As an individual and as the "Joint Tenant Trustee" of Kepoint Preservation Trust, a "private trust agreement," Brown then filed an

amended complaint against the Tax Claim Bureau. In the amended complaint, Brown maintained his constitutional claims, although he complained about he unconstitutionality of a different state tax (Pennsylvania's General County Assessment Law, 72 P.S. §5020-101 *et seq.* and omitted the state law claim. On the Tax Claim Bureau's motion, the District Court dismissed the amended complaint. Brown appeals,[1] and the Tax Claim Bureau moves for summary affirmance and for just damages and double costs. For the reasons set forth below we will affirm.

The Tax Claim Bureau questions Brown's standing. Brown, however, is the real party in interest who claims an injury to his right to contract caused by tax collection efforts, including the threat of the sale of his home, which could be redressed if a court ruled in his favor.

Although Brown has standing, he does not have a meritorious appeal because most of the reasons for the dismissal of his earlier claims apply equally here. Specifically, as we and the District Court have previously explained, the Tax Injunction Act bars the injunctive and declaratory relief sought, *see California v. Grace Brethren Church,* 457 U.S. 393, 408 (1982), and "the free-standing principle of comity" bars damages, *Wright v. Pappas,* 256 F.3d 635, 637 (7th Cir. 2001). Furthermore, the *Rooker-Feldman* doctrine bars review of his claims because Pennsylvania court rulings (that the Pennsylvania Board of Assessment Appeals is the exclusive forum for Brown's claims), in the state court suit that Brown filed after his last federal appeal, are inextricably intertwined with Brown's federal suit. Therefore, the order of the District Court will be affirmed.

In addition, the Tax Claim Bureau's motion for just damages and double costs pursuant to Federal Rule of

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[1] Kepoint Preservation Trust, dismissed for want of prosecution, *see* L.A.R. 108.2, is no longer a party to this appeal.

Appellate Procedure 38 will be granted. We may award damages under Rule 38 when an appeal is "wholly without merit." *See Nagle v. Alspach,* 8 F.3d 141, 145 (3d Cir. 1993). Previously, we affirmed the dismissal of claims similar to those at issue here. Even though Brown protested a different state tax in his amended complaint, his arguments and their refutations remain the same. In addition, since his last appeal, the Pennsylvania state courts have also dismissed his related claims. For these reasons, and after consideration of what amount would equitably compensate the Tax Claim Bureau, *see Beam v. Bauer,* 338 F.3d 106, 108-09 (3d Cir. 2004), we will award Rule 38 damages in the amount of $1,500.00. Costs will be taxed against the Appellant.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-3455

**KEPOINT PRESERVATION TRUST
ORG., BY AND THROUGH J. BROWN,
JOINT TENANT TRUSTEE

v.

D. MICHAEL FISHER, INDIVIDUAL;
COMMONWEALTH OF PA; COMMONWEALTH OF PA
DEPARTMENT OF REVENUE BUREAU OF
INDIVIDUAL TAXES;
COMMONWEALTH OF PA BOARD OF
FINANCE AND REVENUE; COMMONWEALTH OF PA
DEPARTMENT OF REVENUE BOARD OF APPEALS;
THE TAX CLAIM BUREAU COURT HOUSE;
EDWARD W. GILLESPIE, TRAPPE BORO TAX
COLLECTOR; COUNTY OF MONTGOMERY
RECORDER OF DEEDS

*S. James Brown,

Appellant

"(Pursuant to Rule 12(a), F.R.A.P.)
* *(Dismissed Per Clerk's Order of 9/16/04)

On Appeal From the United States District Court For the
Eastern District of Pennsylvania
(D.C. Civ. No. 00-04564)
District Judge: Honorable Mary A. McLaughlin

Submitted Under Third Circuit LAR 34.1 (a)
February 28, 2005

BEFORE: ROTH, McKEE and ALDISERT,
CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1 (a). On consideration whereof, it is now here

ORDERED AND ADJUDGED by this court that the judgment of the district court entered August 17, 2004 be and the same is hereby affirmed. Damages pursuant to Rule 38 in the amount of $1,500.00 are awarded to the Appellee. Costs are taxed against the Appellant. All of the above in accordance with the opinion of this Court.

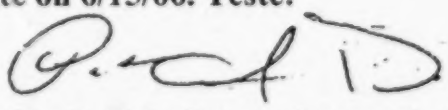
ATTEST:

Clerk

DATED: April 4, 2006

Costs taxed in favor *of Appellee as* follows:
Appellee's Brief.....$139.20
Total .....$139.20 TSO

Certified as a true copy and issued in lieu of a formal mandate on 6/15/06. Teste:



Acting Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

04-3455

Kepoint Preservation
v.
D. Michael Fisher

PRESENT: SCIRICA, Chief Judge. SLOVITER, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, VAN ANTWERPEN
Circuit Judges

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en bane,* the petition for rehearing is DENIED.

BY THE COURT:
/s/ Theodore A. McKee
Circuit Judge

DATED: May 31,2006

tyw/cc: Mr. J. Brown
Philip W. Newcomer, Esq.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3455

Kepoint Preservation vs. Fisher

(D.C. No. OO-cv-04564)

ORDER

It appearing that a panel of this Court disposed of the above case by an Opinion and Judgment, and it further appearing that a Motion to stay the mandate was timely filed by Appellant on 6/7/06 and further appearing that the Clerk's Office erroneously issued the certified judgment in lieu of formal mandate on 6/15/06,

It is ORDERED that the certified judgment issued in lieu of formal mandate on 6/15/06, be and is hereby RECALLED.

For the Court,
/s/ Marcia M. Waldron
Clerk

Dated: June 20, 2006
tyw/cc: Philip W. Newcomer, Esq.
Mr. J. Brown

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

S. James Brown, individual
S. James Brown, Joint Tenant Trustee
With the right of survivorship

Plaintiff

v.

Montgomery County, Pennsylvania
Tax Claim Bureau,

Defendant

Civil Action No. 00-CV-4564
AMENDED COMPLAINT
Jury Trial Demanded

S. JAMES BROWN'S AMENDED COMPLAINT AS OF RIGHT UNDER FEDERAL RULE OF CIVIL PROCEDURE 15(a)

Plaintiff S. James Brown hereby amends his complaint in this action as of right pursuant to **Fed. R. Civ. P. 15(a)** and avers the following.

INTRODUCTION

Plaintiff Brown, individual and as a Joint Tenant Trustee alleges that the Irrevocable Trust contract in dispute to which he is held subject, evidences *a document which the Commonwealth and its political subdivisions are prohibited from taxing under the Constitution or statutes of the United States.* Actions under color of law of the State of Pennsylvania taken by Defendant Montgomery County Tax

Claim Bureau (hereafter "Montco Tax Claim Bureau"), have unlawfully impaired the obligation of the trust contract in dispute in violation of U.S.Const.art. 10, Sec. 10 to the detriment of Plaintiff Brown's civil rights, privileges, and immunities held directly under the protection of the Fourteenth Amendment to the United States Constitution and Section 1983 of Title 42 of the United States Code. Plaintiff Brown sues the Defendant directly under U.S.Const.art. 1, sec. 10, known as the "Contracts Clause" as well as 42 U.S.C. § 1983 and prays for monetary, declaratory, and injunctive relief. The Defendant has threatened numerous times to sell the entrusted realty causing ongoing injury to Plaintiff Brown in constitutional tort which has resulted in the illegal conversion of privately held property to public use and wrongfully diminished Plaintiff Brown's liberty of contract. Money damages alone are inadequate to remedy the continuing violations of federal law. Pennsylvania statutes provide Plaintiff Brown with an inadequate remedy at law and abridge his federal right and personal duty to sue to enforce contract terms in the first instance. Pennsylvania's legislature is prohibited under provisions of the Constitution of the United States from imposing such an unconstitutional arrangement upon Plaintiff Brown, and other natural persons similarly situated. Plaintiff Brown is a natural person who is entitled to the equal protection of the laws.

I. JURISDICTION

Allegation-Plaintiff Brown's Cause of Action Arises Directly Art. 1, Sec. 10, The Bill of Rights and the Fourteenth Amendment to the Constitution of the United States

1. This is a civil action for damages, injunctive and declaratory relief resulting from the deprivation under color of law of the State of Pennsylvania of rights, privileges

and immunities secured to Plaintiff Brown by Article 1, Section 10, the Bill Of Rights, and the Fourteenth Amendment to the United States Constitution. Plaintiff Brown seeks injunctive relief and damages directly under 28 U.S.C. § 1331 and/or 42 U.S.C. §§ 1983 (hereafter § 1983) and 1988 and declaratory relief is sought under 28 U.S.C. § 2201 and/or § 1983. Jurisdiction is conferred upon this Court under the provisions of 28 U.S.C. §§ 1331 and/or 1343. Since it appears that there is no special venue statute for civil rights actions, the general venue statute of 28 U.S.C. § 1391 is controlling.

2. Plaintiff Brown alleges that Defendant Montco Tax Claim Bureau is a "person" as defined for purposes of § 1983, acting under color of law of the State of Pennsylvania who has deprived S. James Brown of federal rights arising as a result of contractual relations.

3. Plaintiff hereby alleges that the Defendant Montco Tax Claim Bureau holds a total "want of power" under the Act of 1947, P.L.1368, as amended, (hereafter "Real Estate Tax Law") to sell realty held subject to the Irrevocable Trust contract in dispute and/or to attempt to collect unlawful levies or assessment obligations allegedly rising under Pennsylvania's General County Assessment Law, codified at 72 Pa. C.S. § 5020-201 et. seq. (hereafter "GCAL").

4. Plaintiff Brown alleges that Pennsylvania's "Real Estate Tax Law" which the Defendants purport to be enforcing, provide S. James Brown an inadequate remedy at law for claims of this nature involving substantive federal questions where the Commonwealth's administrative tribunals lack subject matter jurisdiction. Such an arrangement is violative of his constitutionally mandated pre-deprivation substantive and procedural due process rights to protect against areas in which the state is disabled from acting due to express prohibitions in the U.S. Constitution. S. James Brown's substantive rights include the

federally secured right to bring suit to enforce contract terms against unlawful impairment under color of State law, in the first instance.

5. Plaintiff Brown alleges that the Irrevocable Trust contract in dispute evidences a document which the legislature of the "Commonwealth of Pennsylvania" or its political subdivisions are prohibited from taxing under the Constitution or statutes of the United States.

6. Plaintiff Brown alleges that the coercive collection efforts under the Real Estate Tax Law by Defendant Montco Tax Claim Bureau are unconstitutional as applied to the Irrevocable Trust agreement in dispute due to the impairment of its contractual obligation.

7. Plaintiff Brown alleges that Notice has not been served upon a proper "person" or "owner" subject to tax obligations in accordance with Due Process provisions of the United States Constitution because the private trust agreement, merely entitled "Kepoint Preservation Trust" does not create a taxable natural person, corporation, association or "taxpayer".

I. PLAINTIFF

8. Plaintiff, S. James Brown, is a natural person and obligor held subject to an executory, non-code Irrevocable Trust agreement to convey realty situated in the State of Pennsylvania. S. James Brown currently serves in the capacity of a Joint Tenant Trustee with the right of survivorship under the above referenced "private trust" contract.

II. DEFENDANT

9. The Montco Tax Claim Bureau is an artificial entity and subagency of the corporate County of

Montgomery, Pennsylvania and its address is P.O. Box 311, Norristown, Pennsylvania 19404-0311.

III. FACTS SETTING FORTH CLAIM FOR RELIEF

10. Plaintiff incorporates by reference paragraphs # 1-9 hereof and incorporates those by reference as if fully set forth herein.

11. The executory, Irrevocable Trust contract in dispute arose on February 24, 1997 in relation to realty situated 371 West Main Street, Trappe Borough, Collegeville, PA 19426, which is legally described by Defendant Tax Claim Bureau as Parcel No. 23-00-00781, Block No. 008, Unit-16.

12. The unincorporated Declaration of Trust contract was merely entitled "Kepoint Preservation Trust" (hereafter "Kepoint contract") for private reasons to identify natural persons and property held subject therein.

13. Defendant Montco Tax Claim Bureau has arbitrarily and wrongfully mis-labeled and mis-classified the "Kepoint contract" as a "taxpayer" and "owner or reputed owner" or "person" subject to tax in relation to the subject property as strictly defined under federal law.

14. Defendant Montco Tax Claim Bureau has served all Notice of Public Tax Sale warnings addressed to the "Kepoint contract" as the "Taxpayer" or "person" they claim is subject to delinquent taxes.

15. Absent certain facts, the trust agreement in dispute can not lawfully be arbitrarily forced by the Montco Tax Claim Bureau to descend to the level of a taxable association or "taxpayer" for public purposes.

16. Plaintiff Brown alleges that Defendant has unlawfully altered the status and protected rights of the real parties in interest (natural persons) such as S. James Brown by arbitrarily mis-labeling and mis-classifying the Kepoint contract a "taxpayer" within the class of "real property

owners" and attempting to collect invalid tax obligations upon a contract to which they are prohibited without first violating provisions of the U.S. Constitution.

17. Plaintiff Brown has continually alleged since 1997 that the trust agreement in dispute did not create a natural person, corporation, or taxable association, and accordingly, notice requirements of the Due Process Clauses to a proper "person" subject to tax were not met.

18. Invalid Tax obligations were purportedly assessed under color of State law through the vehicle of Pennsylvania's GCAL annually since 1997 upon a contract which Plaintiff Brown alleges to be one which the Commonwealth or its political subdivisions are prohibited from taxing under the Constitution or statutes of the United States.

19. Defendant Montco Tax Claim Bureau has wrongfully threatened and notified and threatened "Kepoint" (the contract) as the "taxpayer" and "owner" that the above described "real estate" would be exposed at public sale numerous times since 1998 if a payment of money was not made.

20. On May 23, 2003, Defendant Montco Tax Claim mailed another Notice of Public Tax Sale by United States Certified Mail, to "Kepoint" (a contract). See **Exhibit "A".**

21. On June 30, 2003, the Montco Tax Claim Bureau notified Plaintiff that they would not voluntarily remove the subject property from the tax sale scheduled for September 23, 2003 based on the policy decision expressed in the attached letter dated August 26, 2002.. See Exhibit "B".

22. On September 19, 2003 Plaintiff Brown presented an affidavit made by two Joint Tenant Trustees and a check to the Montco Tax Claim Bureau. The affidavit stated in part that a compulsory payment of $27,513.45 would be made *under protest* this day for the

sole purpose of avoiding further complications in pending litigation. The payment was specifically *not* acknowledged to be a valid, or lawful tax obligation. The statement also made clear that "the failure to remove the property from the tax sale while the civil rights action is under appeal is a decision by those whose acts may be fairly said to represent official policy. All responsible persons will be held accountable for damages upon vindication of the federally protected right to be free from unlawful contract impairment in this matter.... Pursuant to U.S.Const.Amends. 5, 14, U.S.C. 1981, 1983, and U.C.C. 1-207, the real parties in interest to the declaration of trust contract in dispute waive no rights by making the payment", *(emphasis added)* **See Exhibit "C".**

23. On September 19, 2003 Plaintiff Brown was referred to Philip W. Newcomer, Esquire who received the money and proceeded to stipulate on the bottom of the above referenced affidavit that "I hereby acknowledge, on behalf of the Montco County Tax Claim Bureau, receipt of $27,513.45 (as evidenced by the attached receipts) being paid under protest. The acceptance of this payment is without prejudice to the positions of any party in the above-referenced matter". **See also Exhibit "C".**

24. The payment made under protest is evidenced by the official check. **See Exhibit "D".**

COUNT I (CONTRACTS CLAUSE)

(INTERFERENCE WITH PLAINTIFF BROWN'S LIBERTY OF CONTRACT AND UNLAWFUL IMPAIRMENT OF THE OBLIGATION OF THE IRREVOCABLE TRUST CONTRACT IN DISPUTE)

25. Paragraphs 1 through 24 hereof are incorporated by reference as if more fully set forth herein.

26. Defendant Tax Claim Bureau imposition upon vested rights under the terms of the trust agreement in dispute impair and abridge the Plaintiff Brown's reserved individual constitutional right to contract guaranteed by the Contract Clause of Article I, § 10 ("No state shall...pass any... Law impairing the Obligation of Contracts") as well as provisions of the Fifth Amendment which are embodied under the incorporation doctrine into the Fourteenth Amendment of the U.S Constitution.

27. Any act(s) by which Defendant Tax Claim Bureau through its county officers and/or the agents, servants, and employees under them impose taxing power within the State of Pennsylvania upon a private trust con tract/document where the Commonwealth and its political subdivisions are prohibited by federal constitutional provisions is an illegal act that is:

a. arbitrary, willful, and against public policy which must protect the individual's liberty and right to dispose and hold property under terms of a private trust contract in relation to private property that cannot be lawfully abridged or impaired;
b. repugnant to the order of the Constitution of the United States;
c. detrimental to the civil rights secured to Plaintiff Brown by the Constitution and statutes of the United States.

WHEREFORE, Plaintiff demands judgment against Defendant Montco Tax Claim Bureau for money damages and injunctive relief enjoining Defendants against Defendant Montco Tax Claim Bureau's illegal imposition of an obligation not embodied in the Irrevocable Trust contract in dispute in violation of applicable federal law, and all other relief that this Court deems equitable and just.

COUNT II (CIVIL RIGHTS VIOLATION)

28. Paragraphs 1 through 27 hereof are incorporated by reference as if fully set forth herein.

29. Defendant Tax Claim Bureau, by and through their concerted efforts to forcefully collect invalid tax obligations, impairs, the obligation of the private trust contract in dispute to the detriment of civil rights, privileges, immunities, and liberties secured to Plaintiff Brown by the Fourteenth Amendment of the U.S. Constitution.

WHEREFORE, Plaintiff Brown prays this Honorable Court enter declaratory and injunctive relief and monetary damages providing that:

a) Any attempt to enforce acts which illegally impair color of state law by the Defendant Montco Tax Claim Bureau is unconstitutional and void; and

b) Actions taken by the Defendant Montco Tax Claim Bureau conflict with the superior authority of the Constitution and statutes of the United States; and

c) The Defendant Montco Tax Claim Bureau is liable under Federal law to Plaintiff Brown for actions taken in violation of his liberty and right to enjoy the lawful exercise of his civil rights, privileges, and immunities arising as a result of contractual relations;

d) A permanent injunction be issued enjoining Defendant Montco Tax Claim Bureau and any person in any manner associated with it from ever attempting to collect, lien, assess, or levy any tax obligation against the persons or property held subject to the Irrevocable Trust contract in dispute (Kepoint) , and

e) That actual and punitive damages, reasonable attorney's fees and costs be ordered to be paid by the

Defendant Tax Claim Bureau and that other appropriate relief be ordered as this court deems equitable and just.

Respectfully submitted,
S. James Brown, individual and
Joint Tenant Trustee
371 W. Main Street
Trappe, Pennsylvania 19426
(610) 489-3913